LIBRARY
SUPREME COURT, U. S.

Off. rt, U.S.
FILED
FEB 14 1966
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A.D. 1965

NO. 1018

WARD LANE, As Warden of the Indiana State Prison,
**Respondent**

v

ARNOLD G. HOBBS,
**Petitioner**

## PETITION FOR CERTIORARI TO THE SUPREME COURT OF INDIANA

ROBERT C. PROBST
Attorney for Petitioner
132-1/2 S. Main Street
Kendallville, Indiana

# INDEX


| | Page |
|---|---|
| The Opinion Below | 1 |
| Jurisdiction | 2 |
| The Statute Conferring This Court's Jurisdiction Over This Petition | 2 |
| The Questions Presented | 2 |
| The Federal and State Constitutional Provisions, Statutes and Rules Involved | 3 |
| Concise Statement of the Case with facts material to the consideration of the Questions presented | |
| A. Nature of the case and its disposition in the Circuit and Supreme Court of Indiana | 7 |
| B. The state, manner, method and disposition by which the Federal Questions, sought to be reviewed were raised | 9 |
| Reasons for Granting the Writ of Certiorari | 11 |
| Conclusion | 18 |
| Appendix A | 19 |
| Appendix B | 39 |
| Appendix C | 57 |

## CITATIONS


Constitutional Provisions
- Article I, Section 14, Constitution of the State of Indiana ..... 4, 17
- Article I, Section 27, Constitution of the State of Indiana ..... 4, 14
- Article I, Section 9, Constitution of the United States ..... 3, 14
- 5th Amendment to the Constitution of the United States ..... 3, 17
- 14th Amendment to the Constitution of the United States ..... 4, 14

Cases
- Griffin -vs- State of California, 1965, U. S. ....., 85 Sup. Ct. 1229 ..... 18
- Malloy -vs- Hogan, 1964, 378 U. S. 1, 84 Sup. Ct. 1489 ..... 18
- Palmer -vs- State, 1929, 198 Ind. 73, 152 NE 607 .... 12
- Shoemaker -vs- Dowd, 1953, 233 Ind. 602, 115 NE2d 443 ..... 13
- Sperou -vs- United States, 1928, 24 Fed. 2d, 796, Cert. Denied, 48 Sup. Ct. 559, 277 U.S. 596 ..... 14
- State ex rel Allen -vs- Fayette Circuit Court, 1948, 226 Ind. 432, 81 NE2d, 683 ..... 17
- United States -vs- Pridgeon, 153 U.S. 48 ..... 14
- Witte -vs- Dowd, 1951, 230 Ind. 485, 102 NE2d, 630 ..... 17

Statutes
- Burns Indiana Statutes 1946 Replacement, Section 3-1901 ..... 4, 14
- Burns Indiana Statutes 1946 Replacement, Section 3-1917 ..... 4, 15
- Burns Indiana Statutes 1956 Replacement, Section 9-1819 ..... 5, 12
- Burns Indiana Statutes 1956 Replacement, Section 10-1704 ..... 5, 12

Supreme Court Rule
- Rule 2-40B ..... 6, 16

Other Authorities:
- American Jurisprudence, Volume 15, Criminal Law, Section 460, page 118 ..... 13
- American Jurisprudence, Volume 25, Section 59, page 188 ..... 13
- American Jurisprudence 2d, Volume 21, Criminal Law, Section 536, page 517 ..... 13
- Indiana Law Encylopedia, Volume 15, Habeas Corpus, Section 15, page 86 ..... 13

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1965

---

NO. .....

---

WARD LANE, As Warden of the Indiana State Prison,
**Respondent,**

V

ARNOLD G. HOBBS,
**Petitioner**

---

## PETITION FOR CERTIORARI TO THE SUPREME COURT OF INDIANA

---

## THE OPINION BELOW

The opinion of the Supreme Court of the State of Indiana was entered on June 24, 1965, and is reported in ..... Ind. .....; 208 NE2nd 182. The majority opinion, the concurring opinion and the dissenting opinion of the Judges of the Supreme Court of Indiana are attached hereto as Appendix A.

## JURISDICTION

The judgment of the Supreme Court of the State of Indiana was entered on the 24th day of June, 1965. The petition for rehearing was filed July 12, 1965, within the time fixed by the rules, which petition for rehearing is set out in full in the transcript in this cause. (R. 126-136) The petition for rehearing was denied on the 22nd day of September, 1965, without written opinion. The time within which to file this petition for writ of certiorari was extended to and including the 19th day of February, 1966, by order of the Hon. Justice Tom C. Clark of the Supreme Court of the United States, which order was entered on the 14th day of December, 1965.

## THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION

This court's jurisdiction over this petition for certiorari is conferred by Title 28, United States Code Annotated, Sec. 1257, Subparagraphs 1, 2, and 3, which authorizes this court to grant certiorari to review judgments of state courts on petitions filed 90 days from the date of such final judgment, and/or within the time fixed under an extension by order of a Justice of the United States Supreme Court.

## THE QUESTIONS PRESENTED

When the petitioner, appellee below, filed his petition for habeas corpus with the LaPorte Circuit Court, LaPorte County, Indiana, a court of competent jurisdiction, charging in his petition that he was being illegally restrained of his liberty and therefore deprived of his constitutional rights by the respondent appellant, and the trial court, on hearing, found that the appellee had served the legal portion of his sentence and was entitled to be released and was then being illegally restrained of his liberty, and therefore ordered appellee released and discharged from the custody of the appellant respondent; therefore, on appeal, did the Supreme Court of Indiana deprive the appellee of his constitutional right to habeas corpus as guaranteed by Article I, Sec. 9 of the Constitution of the United States, and deny him due process

of law and equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States, by ordering the appellee petitioner remanded to the custody of the appellant respondent?

Further, did the Supreme Court of Indiana, by its decision herein, deprive petitioner of his constitutional right as guaranteed under Article I, Section 14, of the Constitution of Indiana, and under the Fifth Amendment of the United States Constitution, which is made applicable to the State of Indiana through the 14th Amendment of the United States Constitution, by holding that the petitioner was required to speak out during the course of the original trial?

## THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The applicable United States Constitutional provisions involved in this appeal are, to-wit:

1. Article I, Section 9, part 2 of the Constitution of the United States, which is:

> (2) The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

2. The Fifth Amendment to the Constitution of the United States, to-wit:

> Criminal actions—Provisions concerning—Due Process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment, Section 1, to the United States Constitution, to-wit:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Applicable provisions of the Constitution of the State of Indiana are Article I, Section 14, which is:

> "Former jeopardy—Self-incrimination.— No person shall be put in jeopardy twice for the same offense. No person, if any criminal prosecution, shall be compelled to testify against himself."

Another applicable provision of the Constitution of Indiana is Article I, Section 27, which is as follows:

> "Suspension of habeas corpus.—The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion; and then, only if the public safety demand it."

The statutes of the State of Indiana applicable are:

Indiana Acts of 1881, Special Session, Chapter 38, Section 778 as found in Burns Indiana Statutes, 1946 Replacement, Section 3-1901, which is as follows:

> "Who may have writ.—Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

Also, Indiana Acts of 1881, Special Session, Chapter 38, Section 789, as found in Burns Indiana Statutes 1946 Replacement, Section 3- 1917, which is as follows:

"Hearing—When party discharged.—The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party."

Indiana Acts of 1927, Chapter 200, Section 1, as found in Burns Indiana Statutes, 1956 Replacement, Section 9- 1819, which is as follows:

"Verdict—Assessment of fine or punishment.—When the defendant is found guilty the jury, except in the cases provided for, in the next three (two) sections, must state, in the verdict, the amount of fine and the punishment to be inflicted; where the plea is guilty, or the trial is by the court, the court, subject to the same exception, shall assess the amount of fine and fix the punishment to be inflicted."

The Indiana Acts of 1905, Chapter 169, Section 392, Indiana Acts of 1931, Chapter 159, Section 1, Indiana Acts of 1935, Chapter 233, Section 1, as found in Burns Indiana Statutes, 1956 Replacement, Section 10-1704, which is as follows:

"Private employees.—Every officer, agent, attorney, clerk, servant or employee of any person, firm, corporation, association, bank, trust company, financial institution or broker, who, having access to, control or possession of any money, article or thing of value, to the possession of which his employer is entitled, shall, while in such employment, take, purloin, secrete or in any way whatever appropriate to his own use, or to the use of others, or who shall knowingly permit any other person to take, purloin, secrete or in any way appropriate to his own use, or the use of others, any money, coin, bills, notes, credits, choses in action or other property or article of value belonging to or deposited with or held by such person, firm, corporation, association, bank, trust company, financial institution or broker in whose employment such officer, agent, attorney, clerk, servant or em-

ployee may be, shall be deemed guilty of embezzlement, and, on conviction, shall be imprisoned in the state prison for any determinate period of not less than two (2) years nor more than twenty (20) years and in addition to such imprisonment he shall be fined not less than one dollar ($1.00) nor more than one thousand dollars ($1,000.00), and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period: Provided, That where the money, coin, bills, notes, credits, choses in action or other property or article of value, taken, purloined, secreted or appropriated shall be of the value of less than one hundred dollars ($100), the punishment may be imprisonment in the county jail or penal farm for a period not exceeding one (1) year and a fine not exceeding five hundred dollars ($500): And, provided, further, That upon a second such conviction for embezzlement the person convicted shall suffer the punishment prescribed for those convicted of embezzlement where the money or property taken is of the value of one hundred dollars ($100) or over."

Rule 2-40B of the Indiana Supreme Court reads as follows:

"Rule 2-40B. Correction of Sentence. Whenever it shall appear from the indictment or affidavit and final judgment in any criminal cause that an erroneous sentence has been imposed by the trial court, the defendant in such cause may at any time petition the trial court to correct retroactively such judgment to conform to the term of imprisonment specified in the applicable statute upon proper notice (By serving a copy of the petition in person or by mail) upon the Prosecuting Attorney of the circuit and the Attorney General of Indiana. An appeal may be taken to the Supreme Court from a final order granting or denying said petition under the same rules and conditions as provided in rules 2-40 and 2-40A of this Court. Effective November 16, 1954."

## CONCISE STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

### A.

### NATURE OF THE CASE AND ITS DISPOSITION IN THE CIRCUIT AND SUPREME COURT OF THE STATE OF INDIANA.

The facts of this case are briefly summarized as follows, viz: that Arnold G. Hobbs, petitioner was indicted and charged with embezzeling $1,600.00, which indictment was based upon the embezzlement statute which provides for penalties of a determinate sentence of not less than two (2) years nor more than twenty (20) years and a fine of not less than $1.00 nor more than $1,000.00.

Trial was had by a jury, and the jury returned a verdict finding the defendant guilty as charged and that his age was 33 years.

Over the objections of the petitioner, the trial judge, the Hon. William Schannen, Judge of the Allen Circuit Court, Allen County, Indiana, where said cause was tried, sentenced this petitioner to 15 years imprisonment in the Indiana State prison and fined him $1,000.00 and costs.

Petitioner, in his petition for writ of habeas corpus, charges that under the determinate sentence provisions of the statute, under which he was tried, it was the duty of the jury to fix the punishment, and in the absence of the jury fixing the punishment, only the minimum sentence was intended.

Petitioner further contended that the verdict of the jury only gave the trial judge jurisdiction to impose a valid sentence on this petitioner of two years, plus one day for the fine, plus time for costs of the action, and all of the sentence imposed by said court in excess of this was void and beyond the jurisdiction of the court to impose.

Further, after the petitioner had served his valid sentence in the Indiana State Prison of two years, plus one day for

the fine, plus time for costs, he was entitled to be released from custody of the said Ward Lane as Warden of the Indiana State Prison, and thereafter petitioner contended his restraint became illegal and he was then being illegally restrained of his liberty and entitled to be released by a writ of habeas corpus.

Accordingly, this action commenced as a petition for a writ of habeas corpus filed on the 19th day of September, 1963, by petitioner Arnold G. Hobbs, to contest the legality of his detention in the Indiana State Prison by the Warden, Ward Lane. The respondent, Ward Lane, was ordered by the LaPorte Circuit Court, LaPorte County, Indiana, to produce the petitioner in open court on the 4th day of October, 1963. (R. 3-30; App. B) On this date the respondent filed his motion to quash the writ of habeas corpus. (R. 31-34) Hearings were held and after oral argument, the motion to quash was overruled on November 22, 1963. (R. 36) On the 13th day of December, 1963, trial was held, evidence was submitted, and on the 16th day of December, 1963, the Hon Alban M. Smith, Judge of the LaPorte Circuit Court, found that the petitioner, Arnold G. Hobbs was being unlawfully detained and illegally restrained of his liberty. The court ordered the petitioner discharged from imprisonment and detention, and from custody of the said appellant, Ward Lane, as Warden of the Indiana State Prison, which order of release is set out in Appendix C; (R. 38-39).

The respondent filed his motion for new trial, which was overruled by the trial court. The respondent then perfected his appeal to the Supreme Court of the State of Indiana from the order and judgment of the LaPorte Circuit Court.

On the 24th of June, 1965, the Supreme Court of the State of Indiana, by majority decision, reversed the judgment of the LaPorte Circuit Court and ordered the appellee remanded to the custody of the respondent appellant as Warden of the Indiana State Prison. (R. 101-123; App. A) Petition for rehearing was timely filed on July 12, 1965, by the petitioner herein, and the petition for rehearing was denied, (R. 126) without written opinion, on the 22nd day of September, 1965. (R. 126-136) Notice of intention to appeal to the Supreme

Court of the United States was timely filed with service as provided by Rule 33 of the Supreme Court of the United States upon the Attorney General of the State of Indiana and Solicitor General of the United States. An extension of time for the filing of this petition for writ of certiorari was granted on December 14, 1965, and time was extended to and including the 19th day of February, 1966, by order of the Hon. Tom Clark, Associate Justice of the United States Supreme Court.

B.

## THE STAGE, MANNER, METHOD AND DISPOSITION BY WHICH THE FEDERAL QUESTIONS, SOUGHT TO BE REVIEWED, WERE RAISED.

The first federal question before this court was raised in the initial stage of this proceedings and the manner in which it was raised was through the original verified petition for writ of habeas corpus instituting this action in the trial court, which petition is attached hereto and identified as Appendix B. The pertinent part of the petition raising the first federal question is as follows:

> "Comes now Arnold G. Hobbs, as the petitioner herein, and complains of the respondent, Ward Lane, as Warden of the Indiana State Prison, and for cause of action arising under the laws and Constitution of Indiana, and the 14th Amendment to the Constitution of the United States of America, petitions and says: ***"
>
> (R 4, Lines 1 to 5 incl.)
>
> "13. That on this date, namely September 19, 1963, this petitioner has now served in excess of four years and three months imprisonment under the terms of said commitment, which describes said judgment hereinbefore set out in this petition; that he has, therefore, served over and above any and all lawful punishments and penalties imposed by the jury in this cause and legally imposed by the trial court; that his present and continued imprisonment and restraint by respondent is wholly by authority

of the void portion of the judgment and commitment, which portion and particular judgment by the trial court was rendered without jurisdiction in this cause; that the petitioner's present imprisonment is, therefore, without right, illegal, and in violation of the due course of law provision of Article one, Section 12, Indiana Constitution, and also the due process and equal protection clause of the 14th Amendment of the Constitution of the United States."

(R 9, lines 9 - 25 incl.)

The full petition for habeas corpus is set out in the record pages 3-28 inclusive and appendix B.

That on the 16th day of December, 1963, the trial court passed upon this question in favor of the petitioner, by finding that he was unlawfully and illegally restrained of his liberty, and that said restraint was illegal and he was entitled to be discharged from imprisonment, detention and custody, and ordered him released as prayed for in his petition for writ of habeas corpus. The findings and order of said trial court are made a part hereof and marked Appendix C, and are found in the record at pages 38 and 39.

Upon appeal by the respondent, the Supreme Court of Indiana, by majority decision, ordered the judgment of the LaPorte Circuit Court reversed and the petitioner appellee remanded to the custody of the respondent. The decision is set out in Appendix A. (R 101 - 124, inclusive.)

The Supreme Court raised the second federal question in their opinion by holding that petitioner had to speak out during the trial. (record P. 104 L10 to L26) Petitioner contends that this is further error on the part of the Supreme Court of Indiana, because petitioner has a constitutional right to safely stand mute and seek his proper remedy at a time of his own choosing and a denial or attempted denial of such right constitutes a denial of his constitutional right under the 5th Amendment and 14th Amendment to the United States Constitution, and a violation of Article I, Section 14 of the Indiana Constitution.

## REASONS FOR GRANTING THE WRIT.

### I.

Rule 19A of the Supreme Court of the United States indicates that the consideration this court weighs in deciding whether to grant the petition for writ of certiorari is under circumstances where a state court has decided a federal question in substance not theretofore determined by this court, or has decided the question in a way probably not in accord with applicable decisions of this court. The decision of the Supreme Court of the State of Indiana is, as petitioner contends, a decision in part, not heretofore determined by this court, and also, in part, contrary to decisions of this court.

Petitioner contends that the Supreme Court of the State of Indiana has denied his constitutional rights by their decision entered in this case; first, the petitioner contends the Supreme Court of Indiana erred in their decision and denied this petitioner his constitutionally guaranteed right to a writ of habeas corpus by ordering him remanded to the custody of the respondent after he had been ordered released through a writ of habeas corpus by the trial court. The petitioner contends that he was entitled to the writ of habeas corpus under the circumstances in this case and the Supreme Court's order remanding him to custody is a denial of that right to habeas corpus. Also, by ordering him remanded to custody when no statutory procedure is provided for such an order as was entered by the Supreme Court of the State, and is therefore a denial of due process of law since no such law and procedure exists where he has previously been ordered released from custody by a trial court.

Further, By holding that petitioner was required to speak out during his original trial, which petitioner contends causes him to be required to act contrary to his constitutional rights.

First, petitioner feels that a presentation of the law explaining why his restraint is illegal and how he is entitled to habeas corpus is necessary.

The petitioner was indicted and tried on a count charging the embezzlement of $1,600.00 and he was tried in the

Allen Circuit Court by a jury for violation of the embezzlement statute being **Burns Ind. St. 1956 Replacements**, Sec. 10-1704, the pretinent part of which is:

> "***shall be deemed guilty of embezzlement and on conviction, shall be imprisoned in the state prison for any determinate period of not less than two years, nor more than 20 years, and in addition to such imprisonment he shall be fined not less than $1.00, nor more than $1,000.00***".

Since this statute provides for a determinate sentence, and the petitioner was being tried by a jury, another statute became directly involved, which is **Burns Ind. St. 1956** Replacement, Sec. 9-1819, the pertinent part of which is as follows:

> "***when the defendant is found guilty, the jury, except in the next three sections, (the indeterminate sentence law) **must state** in the verdict the amount of punishment to be inflicted***". (Emphasis ours)

The jury's verdict was:

"We, the jury, find the defendant, Arnold G. Hobbs, guilty, and that his age is 33 years.

Signed James Pletcher
Foreman."

The trial judge then proceeded, over the objections of this petitioner (R. 131 paragraphs numbered 3, 4, and 5) to sentence him to 15 years and fine him $1,000.00.

The petitioner contends that, by operation of law, the jury was to state the sentence and fine, and since their verdict was silent as to the fine and sentence, they meant that he was to be fined $1.00 and imprisoned for two years, the minimum that can be provided, plus time for costs.

In the case of **Palmer -vs- State**, 1929, 198 Ind. 73, 152 NE 607, the court said:

> "The court, after overruling the motion for a venire de novo, pronounced sentence on appellant that he

be imprisoned in the Indiana State Prison for the determinate period of 10 years. As that was the shortest period of time for which the jury lawfully could have found that he should be imprisoned, if he was guilty of the offense charged, appellant was not harmed by the failure of the verdict to fix the punishment, nor by the action of the court in overruling his motion for a venire de novo. The verdict finding him guilty of the offense of automobile banditry as charged in the indictment necessarily found that he should be imprisoned not less than 10 years."

The petitioner contends that the sentence he received was not an erroneous sentence but was part valid and part excessive and therefore separable. The excessive sentence theory is discussed in the case of **Shoemaker** -vs.- **Dowd**, 1953, 233 Ind. 602, 115 NE 2nd, 443, where at page 447, the following statement is given by Judge Bobbitt:

> "The rule is well settled that if a court having jurisdiction of the person and subject matter imposes a sentence which is merely excessive, such sentence is not void ab initio because of the excess, but is valid insofar as the power of the court extended, and is invalid only as to the excess, and under such a sentence habeas corpus will not lie to discharge the person in custody until he has served as much of the sentence as was in the power of the court to impose. However, after the authorized part of the sentence has been served, any further detention becomes illegal and may be reached by the writ."

This rule is set forth in **25 Am. Jur., Habeas Corpus**, Sec. 59, page 188 and **15 Am. Jur., Criminal Law**, Sec. 460 at page 119, **21 Am. Jur., 2nd, Criminal Law**, Sec. 536, Page 517, and in **15 Ind. Law Encyclopedia, Habeas Corpus**, Sec. 15, page 86.

The petitioner acknowledges that he was required to serve the minimum time for embezzlement, that being two years sentence, time for the fine, and costs of the trial. As soon as this time had been served, he then was entitled to

be released. He has always contended that this was a separable sentence. **Sperou** -vs- **United States** (1928) 24 Fed. 2nd 796, certiorari denied, 48 Sup. Ct. 559, 277 U. S. 596.

In the case of **United States -vs- Pridgeon,** 153 U. S. 48, the court said:

> "Where the court had jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack."

The court further said:

> "It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily or generally, vitiate the valid portion. By section 761, revised statutes, "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case (in habeas corpus) by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

However, the respondent continued to retain him in custody after he had served this time and he contends his restraint then became illegal. The writ of habeas corpus has been guaranteed by the Ind. Constitution, Article I, Section 27, and by the Constitution of the United States, under Article I, Sec. 9, part 2. A denial of this right by the state court is a denial of due process of law guaranteed under the 14th Amendment as well as a denial of habeas corpus guaranteed under Article I, Sec. 9, part 2 of the United States Constitution.

Next, even if his restraint was illegal, was he entitled to the writ of habeas corpus?

The statute in Indiana governing habeas corpus provides in **Burns Ind. St. 1946 Replacement,** Sec. 9-1901:

> "Who may have writ.—Every person restrained of

his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

Another statute on habeas corpus is **Burns Ind. Statutes, 1946 Replacement,** Sec. 3-1917:

> "Hearing—When party discharged.—The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party."

The petitioner contended that his restraint was illegal and that he could use a writ of habeas corpus to inquire into this restraint. The petitioner presented his petition before the LaPorte Circuit Court, LaPorte County, Indiana, and relied on the law heretofore presented contending that the sentence was an excessive sentence under the definition given by Judge Bobbitt in **Shoemaker** -vs- **Dowd,** supra, and was excessive in the amount of 13 years and the sum of $999.00 fine. The LaPorte Circuit Court agreed with petitioner in his order on December 16, 1963, which was in part as follows:

> "***The court further finds that in the absence of the jury fixing the punishment, under the determinate sentence law, that the petitioner was only required to serve a minimum sentence of two years and $1.00 fine, plus the costs, and that the said petitioner has served now a period of four years, six months, and 14 days, which is in excess of the time provided for by the determinate sentence law of the State of Indiana, and that the petitioner was entitled to be released after serving two years, plus one day, plus time for costs of the trial, and that his restraint, after he was entitled to be released, is unlawful, and that the petitioner is now being illegally restrained of his liberty.***"

The court then proceeded to order the petitioner released from custody. Even the respondent agreed in his brief by stating that the judgment of the trial court is not assailed

as being contrary to law. This is quoted in the record p. 118 lines 11 to 15. On appeal, the Supreme Court of the State of Indiana, entered the following order:

> "The judgment of the trial court is reversed, with directions that appellee be remanded to the custody of the Warden of the Indiana State Prison." (R. 109 L 15-19)

There is no statutory procedure for the Supreme Court to directly order the petitioner remanded to the custody of the respondent when he has been released under a right granted by the Constitution.

The Supreme Court, in their decision, said that a rule of the Supreme Court, Rule 2-40B, is the procedure that the petitioner should follow.

Petitioner contends that the decision of the Supreme Court of the State of Indiana sets out a procedure that the court created; and by ruling that the petitioner has to follow the Supreme Court's rule procedure, rather than a constitutionally guaranteed right, and he is ordered returned to prison, effectively denies this petitioner the right to habeas corpus granted to him by the Constitution of the State of Indiana and Article I, Sec. 9, part 2 of the United States Constitution. This rule uses the word **may** and by its wording is not a mandatory procedure.

The Supreme Court, by their decision in this case, requires procedure other than a constitutional right, and, whether this procedure is a proper one or not, if it is required to be used in place of a constitutional right and a man, who has been released through a constitutional right, is ordered remanded to prison, this decision has the effect of denying the constitutional right by replacing it with a Supreme Court rule. This violates the sanctity of the Constitution and replaces constitutional rights.

Petitioner does not contend it is wrong if the legislature or court grants or creates additional remedies and/or adds on to those already granted by the constitution; what he does contend is error is the attempted **replacement** of constitutionally

granted rights and remedies created by the legislature, or the court's rule. This replacement is the denial of this petitioner's constitutional rights, by taking them away and replacing them with legislative rights. If a Supreme Court rule could be made effective in this case, when the rule has the same effect as a statute, the rule would have the effect of abolishing the right to the writ of habeas corpus. If this be true, the rule would be unconstitutional. The writ is not a statutory remedy in a strict sense of the term, but rather a remedy recognized and continued by the Constitution. **State ex rel Allen -vs- Fayette Circuit Court,** (1948), 226 Ind. 432, 81 NE 2d 683.

The legislature could enlarge the right, (so could the Supreme Court rule), but the Constitution prohibits any impairment of the right. **Witte -vs- Dowd,** (1951), 230 Ind. 485, 102 NE2d 630.

## II.

Further the Supreme Court of the State of Indiana by its decision has held that the petitioner was not to stand idly by as a defendant in a criminal case when an error is being made by the court or by the prosecution.

Petitioner challenges this statement because, if such were the law, it violates his constitutional rights against self-incrimination afforded by Article I, Sec. 14 of the Constitution of Indiana, and the 5th Amendment of the United States Constitution, as set out by Chief Justice Jackson at record P. 119, lines 9 to 28 inclusive. (Appendix A)

The appellee respectfully challenges the majority decision as being further incorrect and unsound when the majority of the Supreme Court of Indiana stated:

> "***then go into another court through habeas corpus, asking that the judgment be declared void."
>
> (R. 104 lines 17 - 18)

At no place in the petitioner's original petition did he ever present and argue that this entire judgment was void.

Appellee further insists that the majority decision in this case denies him due process of law by going outside of the issues presented to the trial court.

The appeal in this case had to be decided on the facts in the record, not matters dehors the record.

As heretofore stated by this petitioner, the majority decision, in part, controvenes the ruling precedent of this court when this court said in **Malloy** -vs- **Hogan,** (1964), 378 U. S. 1, 84 Sup. Ct. 1489, quoted at page 1492, as follows:

> "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."

This same rule is further announced by this court in **Griffin** -vs- **California** (1965) ..... U. S. ....., 85 S. Ct. 1229.

## CONCLUSION

The Constitution is the very backbone of our democracy and marks the difference between freedom and anarchy. It stands as a shining example to freedom-loving men everywhere. The absolute sanctity of the inalienable rights granted to all men through this document is imperative to continued freedom. The replacement, restriction, or hampering of any right by anyone must always be prohibited; or the eventual destruction altogether of this priceless document will be inevitable. This destruction begins in small, inconspicuous ways and must be nipped in the bud. For the reasons herein contained, the petitioner respectfully requests this honorable court to grant his petition for a writ of certiorari to the Supreme Court of Indiana.

Respectfully submitted,

ROBERT C. PROBST
Attorney for the petitioner
132-1/2 S. Main Street
Kendallville, Indiana